MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
OCTOBER 20 & 21, 1992

Judge Kenneth F. Ripple called the meeting to order at 8:30 a.m. in the Civil Rights Reading Room at Notre Dame Law School. In addition to Judge Ripple, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Cynthia Hall, Judge Grady Jolly, Judge James Logan, Chief Justice Arthur McGiverin, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of the Solicitor General. Judge Robert Keeton, Chair of the Standing Committee was present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe, the Secretary, and Mr. John Rabiej, Chief of the Rules Support Office, were present, along with Mr. William Eldridge of the Federal Judicial Center. Mr. Kent Hull from Northern Indiana Legal Services was present as an observer (on October 20 only).

Judge Ripple began the meeting by informing the Committee that the proposed amendments to the appellate rules that had been approved by the Standing Committee at its June meeting were subsequently approved by the Judicial Conference at its fall meeting. Those amendments will be forwarded to the Supreme Court.

Judge Ripple then turned the Committee's attention to the items on the agenda for the meeting.

Item 91-4

Fed. R. App. P. 32 provides that at least 11 point type must be used in briefs and appendices. That direction is outmoded. Because most documents are now printed by computers and computer capabilities are constantly changing, the Advisory Committee had previously discussed the possibility of delegating authority to the Judicial Conference to specify acceptable typefaces. The Committee had thought that delegating authority to the Judicial Conference could be more efficient and flexible than repeated use of the Rules Enabling Act procedures. The Committee had asked the Reporter to prepare a draft giving the Judicial Conference that authority.

Professor Mooney prepared two drafts for the meeting. She noted that her memorandum raised questions about the appropriateness of authorizing the Judicial Conference to change the list of acceptable typefaces from time to time, thereby changing the content of the rule without following the procedures outlined in the Rules Enabling Act. In light of those questions the first draft takes a different approach. Draft one authorizes the courts of appeals to adopt local rules governing typeface but in order to provide some level of uniformity, the local rules must be based upon a list of acceptable typefaces prepared by the Judicial Conference. Draft two follows the Committee's earlier suggestion and

incorporates by reference into FRAP a list of acceptable typefaces prepared by the Judicial Conference.

Judge Jolly began the discussion by suggesting that a rule limiting the number of characters per page would work better. Judge Williams asked who would count to insure compliance.

Judge Hall asked whether footnotes and quotes should be specifically addressed. She noted that excessive use of footnotes and quotes -- which are often in smaller type and single spaced -- can make a brief very difficult to read.

Mr. Strubbe pointed out that the Seventh Circuit recently changed its rule so that briefs and appendices must be prepared using a typeface that has no more than 11 characters per inch.

Judge Williams suggested using either draft one or draft two and incorporating a characters per inch standard.

Judge Ripple stated that the Committee should consider ease of administering the rule and the need for some flexibility, so that the standard can keep ahead of the bar. He suggested amending FRAP to include a characters per inch standard but allowing the local court to provide otherwise.

Judge Jolly stated that he would prefer to leave the rule unchanged unless the Committee could agree on a uniform standard.

Judge Hall noted that the Ninth Circuit is concerned about keeping briefs short and readable. She thought a standard based upon the number of characters per inch would be helpful but, in order to control the readability of documents, it would be necessary to have the flexibility to add other specifications, such as requiring that all material be double spaced.

Mr. Kopp stated that the rules should go as far as possible to establish a uniform standard. Whenever the circuits differ in their treatment of issues, especially issues of form, the bar is tempted to argue that a practice that is acceptable in the First Circuit should be acceptable in the Eighth.

Chief Justice McGiverin agreed that the rule should provide the standard.

Judge Ripple noted that a consensus was developing that the rule should include a standard akin to the number of characters per inch and that neither of the drafts should be used. The Committee agreed. Judge Ripple requested that Judges Jolly and Hall, and Mr. Strubbe assist the Reporter in developing a new draft after the meeting.

Item 91-5

Item 91-5 is a proposal to add a rule authorizing the courts of appeals to use special masters.

At the Advisory Committee's December 1992 meeting, the Committee briefly considered a draft rule authorizing the courts of appeals to use special masters. That draft was modeled upon Fed. R. Civ. P. 53. The Committee consensus was that a shorter, simpler rule would be preferable.

Judge Logan expressed approval of the new, shorter draft. The only question he had about the draft was whether a party should be given an opportunity to react to a master's recommendations.

With regard to effect of a master's findings, Judge Boggs thought that a panel would not want to be held to a clearly erroneous standard. Mr. Kopp stated that he liked the language used in the draft. The draft states that a master would make a recommendation to the court. Mr. Kopp thought that the word "recommendation" avoids the sensitive question of the scope of review and leaves to the judge's discretion the weight to be given to a master's recommendation.

Mr. Kopp expressed the further opinion that a master should not be involved in matters of mixed law and fact, as permitted in the draft, but that a master's scope of operation should be limited to matters of fact.

Judges Hall and Logan asked Mr. Kopp whether a master should be permitted to make determinations in matters involving fees or attorney discipline. Mr. Kopp replied that it would be appropriate to use a master for such questions because such questions are separate from the adjudication of the case.

One of the questions raised by the reporter's memorandum was whether only court officers should be masters, in which case the provision for compensation could be omitted from the draft. Judge Hall noted that the Ninth Circuit is trying to find a way to provide uniform treatment of fee questions without using judges to determine fee questions. One possibility they have considered is using a master for fee questions. The circuit had hoped to use retired magistrates for that purpose but that has proven difficult. Some of the district courts use retired state court judges. In short, she thought that the rule should allow the use of persons other than federal court officers.

Judge Ripple agreed that because there may not be enough court officers available to act as masters, it would be a good idea to permit use of non-court officers. He further noted, however, that it also may be important that the public perceive that the court of appeals controls the process.

Mr. Froeb asked whether the term "court officer" includes only judges or also other persons employed by the court. He also noted that the draft contemplates compensating non-court officers, whereas in the state courts such services are often provided *pro bono*.

Judge Logan stated that a person is always free to waive compensation. He opposed changing the language of the rule to state that "the court shall determine the master's compensation, if any." Adding "if any" could make a person believe that he or she must donate their services.

Judge Keeton asked if a "court officer" is different than an "officer of the court." Judge Logan suggested changing the language to "judge or court employee." Judge Ripple took a vote on that suggestion; seven members approved it and none opposed it. Judge Ripple then asked for a vote on lines 9 and 10 as amended, and there was unanimous approval of the sentence.

Judge Ripple then returned the discussion to Mr. Kopp's question about whether a master should hear matters of mixed fact and law or only factual matters. Judge Hall stated that if a master merely makes a recommendation to the court, there should not be any difficulty with a master hearing mixed matters. Judge Williams noted that characterization of an issue as a "factual matter" is itself a slippery matter and that limiting a master's scope to factual determinations would not provide hard and fast limits.

Judge Boggs once again asserted his opinion that the appropriate breadth of a master's inquiry is interrelated with the weight to be given to the master's determination. If no deference must be given to a master's determination, then there is no need to limit the scope of the master's inquiry. Judge Boggs noted that the current draft gives the court discretion to accord a master's recommendation complete deference or to review it with great scrutiny.

Judge Logan asked if limiting a master's scope of inquiry to factual matters would limit a court's ability to use masters to make recommendations about sanctions or attorney's fees.

Judge Williams stated that in 99 cases out of 100 when a factual issue is unresolved, the court of appeals remands the case to the district court or agency. He would not want the adoption of the rule to signal a change of that policy. Judge Logan agreed. Masters are needed to address factual issues arising in the first instance in a court of appeals, such as attorney discipline or fees for representation on appeal. The consensus was that the Committee Note should address that concern.

Judge Ripple suggested amending the draft to state that a master may "make recommendations as to factual findings and disposition."

Mr. Kopp expressed concern about authorizing a master to make recommendations about "disposition." He noted that in another 10 or 15 years the rule could be used to delegate decisions that are currently, and appropriately, made by judges. He argued that the rule should authorize the use of masters only for "auxiliary matters."

Judge Ripple suggested adding the following introductory clause to the beginning of the first sentence: "In adjudicating matters ancillary to the appeal." One of the members asked whether the term "appeal" would cover disbarment of an attorney, or mandamus, or bail matters. The question prompted changing the language to "ancillary to proceedings in the court" and moving it to the end of the first sentence so that the first sentence would read as follows: "A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court."

Judge Ripple then asked the Committee whether the rule should provide a mechanism for a party to respond to a master's recommendation or whether the rule should remain silent and permit the court to tailor such procedures in individual cases. The Committee decided not to include any such provision in the rule.

The rule as amended was unanimously approved for submission to the Standing Committee with a request for publication.

The amended rules reads as follows:

Rule 49. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Item 91-7

In August 1991, Mr. Craig Nelson wrote to Judge Keeton suggesting amendment of the United States Code or of the Federal Rules to provide an appeal as a matter of right from an order remanding a case to the state court from which it had been removed. That suggestion was circulated to all of the advisory committees for their consideration.

The consensus of the Committee was that no further action should be taken. Making a change (which would need to be statutory) would make a difference in only a very small number of cases yet would require review of a far greater number. Any change would be premised upon exercise of bad faith by district judges, an assumption that cannot be operative.

Item 91-11

Seven circuits have local rules that permit the clerk to return or refuse to file documents if the clerk determines that the documents do not comply with the federal or local rules. The Local Rules Project recommended amendment of Fed. R. App. P. 45 to state that a clerk does not have authority to return or refuse documents.

Both the Civil Rules and the Bankruptcy Rules have recently added provisions to that effect. In both instances the prohibition is contained in the rules on filing and service. Fed. R. Civ. P. 5 and Bankr. R. 5005. The reporter drafted a similar amendment to Fed. R. App. P. 25(e) for the Committee's consideration. It provided: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices."

Item 91-11 is interrelated with the Solicitor General's suggestion in Item 91-26 dealing with briefs and appendices. The Solicitor General suggested that when a party submits a brief or appendix that, in the opinion of the clerk, does not comply with the requirements of Rule 32, the clerk should be able to inform the party of the nature of the noncompliance and specify a date by which the party may correct the noncompliance, all without the necessity of judicial intervention. If the party refuses to take the suggested action or fails to do so, the clerk must then refer the matter to the court for a ruling.

The suggested language was as follows:

Rule 32. Form of a Brief, an Appendix, and Other Papers

* * *

(c) *Nonconforming Brief or Appendix.*— The clerk of a court of appeals may notify a party when, in the clerk's judgment, the party has filed a brief or appendix that does not comply with these rules. In such event, the clerk shall inform the party of the nature of the noncompliance and specify a date by which the party may correct the noncompliance. If the party corrects the noncompliance by the date specified, the corrected brief or appendix will be treated as filed on the original filing date, unless the court orders otherwise. The time for filing any responsive document to a corrected brief or appendix runs from the original filing date unless the court orders a different time. If in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Judge Hall commented that the Solicitor's suggestion provides a party with an easy way to get an extension that the party couldn't get any other way.

Mr. Strubbe stated that all of the court of appeals clerks thought they had authority to reject non-conforming filings and that such screening was a relatively major part of their jobs. With regard to the proposed amendment to Rule 25(e), he asked what is covered by a defect in "form."

Judge Keeton reported that the reason for the change in Civil Rule 5(e) was that there was a sense that substantive rights were being prejudiced by clerks refusing documents.

Judge Boggs asked whether the practice in the Sixth Circuit of stamping documents as "received and tendered for filing" would be acceptable under the rule. Judge Keeton replied that in his opinion, such action would constitute "acceptance for filing."

Judge Keeton also pointed out that the amendment to Rule 25 would not preclude the clerk from screening documents and attempting to handle them informally in a manner similar to that outlined in the Solicitor's suggested addition to Rule 32.

Judge Logan noted that the only jurisdictional document filed with the courts of appeals is a petition for rehearing. He also stated that his court has a rule permitting the clerk to refuse non-conforming documents; however, the actual practice of the clerk conforms rather closely with the Solicitor's suggestion. He also noted that the proposed amendment to Rule 25 apparently would permit the court to prohibit filings from certain troublesome parties. Rule 25 deals generally with "papers required or permitted to be filed" and the language precluding the clerk from refusing a documents states that the clerk may not refuse a paper "solely because it is not presented in proper form."

Mr. Strubbe noted that the provision in the Solicitor's draft that the time for filing responsive documents runs from the original date of tender has two effects: 1) the appellant receives a non-approved extension of time, and 2) the appellee's time for preparing a response is shortened. The clerks think that the *de facto* extension of time is problematic.

Judge Ripple summarized the options before the Committee. First, the Committee could decide to take no action. Second, the Committee could approve the amendment to Rule 25 which conforms it to Civil Rule 5(e). Third, the Committee could also approve the amendment to Rule 32 stating that a clerk may inform a party about formal defects in a brief or appendix and set a date by which a corrected document should be presented to the court. Fourth, the Committee could incorporate the Solicitor General's suggestion into Rule 25 either in the language of the rule itself or in the Committee Note.

Judge Logan and Mr. Froeb favored the amendment to Rule 25 on the basis of consistency with the other rules.

Judge Jolly stated that he was not aware of any party who had been denied any right by tendering a non-conforming document and therefore the Committee should not amend the rules.

Mr. Kopp stated that at least in theory there is a concern about the filing of a petition for rehearing because it is a jurisdictional document.

Judge Hall expressed the opinion that there is a difference between a district court and a court of appeals in handling papers.

Judge Williams suggested that the reporter take the Solicitor General's proposal, altered so that it is not so generous about extensions of time, and include it in the Committee Note to Rule 25. Judge Williams then moved approval of the proposed amendment to Rule 25 as written. The motion was unanimously approved and there was consensus that the Note be amended to reflect the ability of the clerk to continue to screen documents and to work with parties.

Judge Ripple then asked the Committee to return to consideration of proposed Rule 32(c). Judge Logan favored the proposal but expressed some hesitation about the provision governing the running of time for responsive briefs. In favor of that provision, he noted that in most instances the document initially offered for filing would contain most of the information needed to prepare a response.

Mr. Kopp responded to the earlier comment about the ability of a party to get an extension by a bad faith filing of a non-conforming document. Mr. Kopp believed that the proposal gives the court the flexibility to deal with such a party.

Judge Ripple asked if the Committee thought the rule should contain a time limit for resubmission of a corrected document and, if so, what limit. Judge Logan suggested that issue should be left to local practice. In a circuit covering a wide geographic area a longer time would be needed than in a smaller circuit. Judge Logan also noted the time needed depends upon the type of defect. Use of the wrong type of cover can be quickly corrected whereas a missing appendix takes more time to produce.

Judge Hall expressed some doubts about the coordination of this proposal with the change in Rule 25 just approved. Judge Logan stated that he saw no inconsistency; the clerk must file any document presented but if a document is non-conforming, the clerk may send it back and ask for correction. Judge Logan further stated that ordinarily there are three types of documents filed with a court of appeals; briefs, petitions for rehearing, and motions. Only briefs create any problem with regard to the time for filing a responsive document. Typically there is no response to a petition for rehearing and the court normally sets the time for filing a response to a motion.

Judge Jolly questioned the need for any provision in Rule 32 regarding non-conforming filings. The amendment to Rule 25 will insure that a party's rights are not prejudiced because the document will be filed. If the Note to Rule 25 makes it clear that a clerk may continue to screen documents, the amendment to Rule 32 would be unnecessary and perhaps confusing.

Judge Ripple called for a vote on the proposed addition of subdivision 32(c). Four members voted in favor of it; four opposed it. The proposal failed to carry.

Judge Ripple announced that the subcommittee working on item 91-12 had asked that the discussion of that item be postponed until the following day so that the subcommittee would have an opportunity to meet and hopefully combine their two proposals.

Item 91-13

Fed. R. App. P. 41 is silent as to the standard that should be used to determine the appropriateness of a stay of mandate. Ten circuits have local rules that establish standards to be used in determining whether to stay a mandate. The Local Rules Project suggested that the Advisory Committee consider amending Rule 41 to include standards for granting a stay of mandate.

Judge Ripple opened the discussion by noting that the local rules articulate a variety of standards and that the Supreme Court also has articulated rather detailed standards that it uses in determining whether to issue a stay. He additionally pointed out that when this topic was last discussed Chief Judge Sloviter had advised caution because articulating such standards comes close to the substance/procedure line.

The Reporter had prepared a draft amendment that would require a motion for a stay to "show that a petition for certiorari would present a substantial question and that there is good cause for a stay." She also offered five variations, the last of which most closely tracked the Supreme Court's standards.

Judge Logan expressed dislike for the fifth option in death cases although he admitted that the formulation would eliminate the widely varying local rules and the language is consistent with the Supreme Court standards.

Judge Keeton noted that the main draft is directed to parties, not to the courts, and it does not specify the standard the court must apply.

Mr. Kopp stated that although he usually favors elimination of local rules and establishment of a national rule, the standards have been developed by case law and the lack of consensus makes this a difficult rule to draft.

A motion was made to approve the main draft on page 6 of the Reporter's memorandum. It was approved by a vote of 6 to 2.

Judge Keeton raised a question about the Committee Note. He asked if the note should state that the standard to be applied by a court must be developed by case law and any local rule that sets a standard is invalid. Judge Logan noted that if the note suggests that a circuit can have any standard it wants, that invites motions for stays. He suggested that the note simply state that the Supreme Court has set forth its standards in Barnes. The purpose of the rule is to tell lawyers what they should do to conform with the Supreme Court's standards. The Note should alert counsel to the type of showing that needs to be made to satisfy the Supreme Court standard.

The Committee adjourned for lunch at 12:00 noon.

The Committee reconvened at 2:15 p.m.

Item 91-14

Fed. R. App. P. 21 provides that in mandamus actions the judge should be named as a party and be treated as a party with respect to service of papers. Nine circuits have local rules stating that a petition for mandamus should not bear the name of the judge. Six of those rules also provide that unless otherwise ordered, if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief and that the lawyer appears in the name of the party and not of the judge. Although Rule 21 anticipates that a judge may not wish to appear in the proceeding, the rule requires the judge to so advise the clerk and all parties by letter. Six of the local rules reverse the presumption and require a judge who wishes to appear to seek an order permitting the judge to appear. The Local Rules Project suggested that the Advisory Committee consider amending Rule 21 to reflect the local rules.

Chief Justice McGiverin noted that the proposed draft tracks several of the local rules. He stated that Iowa had changed its rule in a similar manner and he favored the change. Judge Logan also supported the change.

To get a sense of the Committee's reaction Judge Ripple asked for a vote on the substance of the amendment, as distinguished from the exact language; it was unanimously approved.

The Committee then turned its attention to the language of the proposal and made several amendments. Particular attention was paid to the use of the term *pro forma*. Judge Williams suggested that the Committee Note explain what the Committee means. The amended draft reads as follows:

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) *Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition directed to a judge or judges shall ~~be made by filing~~ file a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action in the trial court. The petition shall be titled simply, In re _____, Petitioner. All parties below other than the petitioner are respondents for all purposes. The petition ~~shall~~ must contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record ~~which~~ that may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial, Order Directing Answer.* - If the court ~~is of the opinion~~ concludes that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that the respondents ~~an~~ answer ~~to~~ the petition ~~be filed by the respondents~~ within the time fixed by the order. The ~~order~~ clerk shall ~~be served by the clerk~~ serve the order on the judge or judges ~~named respondents~~ to whom the writ would be directed if granted, and on all other parties to the action in the trial court. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes.~~ Two or more respondents may answer jointly. ~~If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, unless otherwise ordered, counsel for the party opposing the relief, who shall appear in the name of the party and not of the judge, shall represent the judge pro forma. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties, ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

* * *

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may direct that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Fed. R. App. P. 9(a) governs appeals from orders respecting release pending trial and 9(b) governs motions for release pending appeal. Both subdivisions state that review of bail determinations shall be made "without the necessity of briefs . . . upon such papers, affidavits and portions of the record as the parties shall present." The rule leaves to the discretion of the parties which papers and information will be presented to the court.

Seven circuits have local rules that specify the type of information the courts want a party to present in the "papers." Several of the local rules require submission of a memoranda. The Local Rules Project classified all of the local rules as in conflict with the federal rule. The Fifth Circuit urged the Advisory Committee to consider amending Rule 9 to specify the type of information that should be presented. At the Advisory Committee's December 1991 meeting the Committee asked the reporter to prepare drafts for the Committee's consideration.

Judge Ripple noted that the drafts prepared for the meeting address two separate issues: amendment of the rule to accommodate the government's ability to obtain review of bail determinations; and amendment of the rule to specify the type of information that should accompany a request to review a bail decision.

Judge Keeton observed that under section 3143 there are three times during which release decisions may be made: pre-trial; after verdict but before sentencing; and, after sentencing pending appeal. Judge Keeton suggested combining subdivisions (a) and (b).

Judge Williams stated that subdivision (a) governs appeals prior to judgment of conviction (the first two of the times identified by Judge Keeton) and that subdivision (b) might simply note that when review is sought pending appeal, *i.e.*, when the party seeking review of the release decision has already filed an appeal, review of the release decision can be obtained by motion. Subdivision (b) might then simply state that in all other respects the review process is handled in the same way as when review is sought prior to judgment of conviction.

With regard to the information that should be presented to the reviewing court, Judge Logan stated that the proposed drafts identify the basic materials and the rule should require a party to present those materials. Judge Hall noted that because a court is often asked to review release decisions on an emergency basis, clearly requiring the presentation of essential materials will be helpful. Judge Hall expressed a preference for Draft One.

The Committee began consideration of Draft One but after some discussion decided that some redrafting should be undertaken. A subcommittee consisting of Judge Jolly, Judge Keeton, and Judge Williams agreed to confer and attempt to prepare a new draft for the Committee's consideration on Wednesday morning.

One of the recurring issues raised by the courts of appeals in their responses to the Local Rules Project's Report on Appellate Rules was that the Committee should consider amending Fed. R. App. P. 28 which governs the contents of briefs, to require some of the items the circuits require in their local rules. At the December 1991 meeting the consensus of the Committee was that Rule 28 should be amended to require a summary of the argument and, if a party intends to claim attorney fees for the appeal, a statement to that effect with citation to the statutory basis therefor.

Several members of the Committee expressed approval of requiring a summary of argument. Judge Jolly noted that the summary is helpful when determining whether oral argument is warranted. When Judge Ripple asked for a vote on the substance of the proposal, it received unanimous approval.

The Committee then turned its attention to the language of the draft. After brief consideration, the Committee consensus was that the requirement should not be included in the "argument" paragraph, but that there should be a separate paragraph requiring a "summary of argument." The Committee unanimously approved the following proposal:

Rule 28. Briefs

(a) *Appellant's Brief.*– The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * *

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief.*– The brief of the appellee must conform to the requirements of paragraphs (a)(1)- ~~(5)~~ (6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the standard of review.

With regard to the proposal that if a party intends to seek attorney fees for the appeal, the party's brief must contain a statement so indicating, Mr. Froeb noted that it might be better to present that claim in a motion at a later time when both parties are better able to argue their position.

Judge Hall noted that awarding attorneys fees is mandatory in many instances. Only when they are discretionary is there any need for argument about them.

Judge Logan wondered whether adding such a requirement would encourage fighting over attorneys fees. The requirement would make a lawyer who might not win the appeal feel that the brief must claim attorneys fees. Judge Logan also noted that something may occur in a reply brief that prompts the appellee to seek attorneys fees. Judge Logan moved to delete the proposal. Judge Williams seconded the motion and it was approved by a vote of six in favor, two opposed.

Before the meeting adjourned at 5:00 p.m., Judge Ripple advised the Committee that the first item of business in the morning would be consideration of the preemption question in Rule 32.

The meeting reconvened on Wednesday, October 21, at 8:30 a.m. All members in attendance the preceding day were in attendance once again.

91-26

The discussion returned to Rule 32. This time the Committee focused on the proposal that a new subdivision, subdivision (d), be added to Rule 32. The proposed subdivision stated that Rule 32 preempts all local rules concerning the form of briefs.

Mr. Kopp introduced the topic. He noted that Rule 32 and the local rules supplementing it are filled with a number of minor matters. Because the rules cover subject matters like binding and type style, the sensitivity about the ability to have a local rule is presumably not as high as with many other subject matters. When formulating the proposed draft, the Solicitor's Office reviewed all of the local rules and included any matter that seemed important in the draft. Mr. Kopp stated that he held no brief for the particulars of the draft; for example, it is not important whether the rule requires staples to be covered, but it is important that the rule addresses the binding issue. The heart of the Solicitor's proposal is that the rule should address the issues and preempt local rules.

Judge Logan made a motion to adopt the preemption provision. The motion was seconded by Chief Justice McGiverin. Discussion followed.

The first speaker asked about the enforcement technique. Although most circuits would probably conform, the members noted that questions about the timing of the repeal of local rules might arise. The rule might also give rise to disputes concerning whether a local rule added to or subtracted from the national rule.

Judge Ripple noted that the local rules have been used for experimentation and innovation. In fact, the last several additions to Rule 28 have been modeled upon successful local experiments. The local variations have been minor, such as requiring a summary of argument, but having proven useful, those ideas have percolated up and improved the national rules. On the other hand Judge Ripple stated that in this case, as in all instances of local variation, the Committee needs to be concerned about the burden local rules place upon national practitioners. A rule forbidding all local variations may be too rigid, however, if national uniformity is needed only to ease a practitioner's administrative burdens rather than to prevent confusion.

Judge Boggs suggested that the Committee Note contain hortatory language asking the circuits to limit their additional requirements to those that have been carefully considered in light of the desirability of national uniformity.

Judge Jolly suggested amending the language of proposed subdivision (d) to state that the requirements of Rule 32 concerning form "shall prevail over local rules."

Mr. Strubbe once again asked what exactly is included within the term "form."

Judge Williams noted that the scope of the draft is constrained by the fact that it states that "the requirements of this rule" preempt local rules. Judge Logan noted that Rule 32 covers only typeface, cover colors, binding, and the information that must be included on a cover.

Judge Ripple suggested that the Committee consider Judge Boggs' suggestion that the Committee Note include an admonition to the circuits asking them to exercise restraint when considering local variations. Judge Ripple also suggested that there may be some non-rule methods of addressing the issue such as a report in F.R.D. or working with the clerks' committee on rules.

Mr. Kopp stated that when the Committee discussed the Local Rules Project, the Committee talked about some sort of screening process for local rules. Judge Keeton pointed out that under § 2071(c)(2) the Judicial Conference has responsibility for monitoring the local rules adopted by the circuits and that function, no doubt, would be referred to the Advisory Committee on Appellate Rules.

Judge Ripple called for a vote as to whether the Committee wished to include a preemption provision in Rule 32. One member favored a preemption provision, six opposed the idea.

Judge Ripple asked members to consider Judge Boggs' suggestion and alternate ways of communicating to the clerks and circuits about engaging in responsible experimentation. Judge Ripple asked the same members who were considering the typeface issue as well as Mr. Kopp and Judge Boggs to consult with the Reporter.

The discussion then shifted to consideration of the other amendments to Rule 32 proposed by the Solicitor General's office and Mr. Strubbe. The Committee turned to the draft beginning on page 11 of the Reporter's memorandum. On line 6, the draft proposed limiting the carbon copy exception for parties proceeding in forma pauperis to *pro se* parties. Because photocopying is inexpensive, some courts have local rules prohibiting counsel representing a party proceeding in forma pauperis to use carbon copies. Judge Williams moved for approval of the change; Mr. Froeb seconded it. The change was unanimously approved.

At lines 17 and 18, the draft proposed adding the following sentence: "A brief or appendix must be stapled or bound on the left side in any manner that is secure and does not obscure the text." The Committee discussed several variations found in the local rules and concluded that in some instances top binding, especially of an appendix, is appropriate and that it would be better to delete the requirement that the documents be bound on the left. Judge Jolly also moved that the sentence be amended to require binding in a manner that permits a brief to lie flat when open. The Committee unanimously favored both suggestions. The amended sentence reads as follows: "A brief or appendix must be stapled or bound in any manner that is secure and does not obscure the text and that permits it to lie flat when open.

The Committee unanimously favored deleting the sentence providing a special exception concerning the size of briefs in patent cases. The Federal Circuit's local rules do not permit briefs in patent cases to exceed the usual size so there is no further need for the exception in the national rule.

At lines 23 and 24, the rule provides that "[i]f a brief is produced by a commercial printing or duplicating firm, or if produced otherwise and the covers to be described are available, the cover" must be a certain color depending upon the role of the party filing the brief. Judge Logan suggested deleting the "are available" language. That language essentially makes the rule unenforceable. It was suggested that all language through the words "are available" on line 24 be stricken and replaced by the words, "Except for *pro se* parties." It was also suggested that on line 25 the word "blue" should be followed by a semicolon and that on line 26 the word "any" should be preceded by the word "and." Judge Ripple asked for a vote on lines 23 through 26 as amended. The changes were approved unanimously.

At lines 30 and 31 the draft proposed that the cover should include the number of the case, centered at the top of the front cover. That proposal was approved unanimously.

Currently Rule 32(b) makes the rule applicable to a petition for rehearing as well as to a brief or appendix. At lines 38 and 39 the draft proposed that the Rule 32 requirements also should apply to "a suggestion for rehearing in banc and any response to such petition or suggestion." That proposal was approved unanimously. At lines 40 through 42 the draft proposed that the cover of a petition for rehearing or of a suggestion for rehearing in banc, as well as any response to either, should be yellow. The Committee voted unanimously to strike that change.

The Committee voted unanimously to amend lines 45 and 46 to provide: "Carbon copies may not be filed or served except by *pro se* parties." The Committee also voted unanimously to amend lines 47 and 48 to state that "A motion or other paper addressed to the court need not have a cover but must contain a caption that includes the name of the court . . ." Lastly the Committee agreed to make the materials on lines 42 through 49 dealing with motions a single and separate paragraph.

91-27

The Local Rules Project identified several local rules that conflict with the federal rules because the local rules require a party to file a different number of copies of a document than the federal rules require. The Committee had previously decided that rather than prohibit local variation it would be better to authorize it and make parties aware that a local rule may alter the number set by a national rule. The Committee asked the reporter to prepare draft amendments to each of the rules indicating that the number of copies may be altered by local rule or order in a particular case.

The Committee unanimously approved identical changes to Rules 5, 5.1, 21, 25, 27, and 30. Each of those rules will state that an original and a certain number of copies must be filed "unless the court requires the filing of a different number by local rule or by order in a particular case."

The draft language in Rules 3 and 13 differed from that approved in the first category because rather than setting a base line number the drafts require an appellant to file enough copies for the court to serve each party with a copy. By unanimous consent of the Committee Rules 3 and 13 will both include language stating: "At the time of filing [a notice of appeal] the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of [this] Rule 3." The Committee also unanimously approved amending Rule 35 to provide that "The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case."

Mr. Kopp prepared sample charts showing the number of copies of a given document required by each of the circuits. He suggested that it would be desirable to have such a chart at the beginning of each set of local rules. Mr. Kopp suggested that a statement in the Committee Note about the desirability of such charts might be all that is needed to encourage

the use of them. Judge Ripple suggested sending out a letter to the circuits enclosing the charts and suggesting their use. Judge Williams suggested that the charts show the required number of copies with citation to the controlling rule -- whether federal or local. Mr. Kopp pointed out that the charts as drafted currently do that. The Committee unanimously approved sending the charts to the circuits. The Committee also suggested that the Committee Note accompanying Rule 25 include a statement that the circuits should consider making readily available to practitioners charts showing the number of copies to be filed and citing the controlling rule.

91-22

The Committee returned to the bail question and considered the new draft prepared by Judge Keeton, Judge Williams, Judge Boggs, and Judge Ripple. The new draft did three things: 1) retained the existing structure of the rule but updated the text in light of the Bail Reform Act; 2) made it clear in subdivision (b) that the requirements in (a) apply to post-sentencing review and that there is an additional requirement -- that information about the conviction must be provided; and, 3) made clear those instances when review may be sought by motion.

The draft provided:

Rule 9. Release in a Criminal Case.

(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -- The district court shall state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. To obtain review of such an order, the appellant, within fourteen days after filing a notice of appeal with the district clerk, shall file with the appellate clerk a copy of the district court's order and its statement of reasons and if the appellant questions the factual basis for the district court's order, a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require not including briefs unless the court for good cause so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) Appeal from an Order Regarding Release After Judgment of Conviction.-- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal with the district clerk, or by filing a motion with the appellate clerk if the party has already filed a notice of appeal of the judgment of conviction or the terms of the sentence. Both the order and the review are subject to the terms of Rule 9(a). In addition, the papers filed by the applicant for review must include a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence.

24
25 *(c) Criteria for Release.*-- The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. sec. 3142 and sec. 3143.

The Committee discussion resulted in a number of changes in the draft.

1. The draft would have required an appellant to file with the court of appeals, within fourteen days after filing a notice of appeal, a copy of the district court's order and its statement of reasons for the order. The fourteen day requirement was deleted and replaced by a requirement that the documents be filed as soon as practicable after filing the notice of appeal. As soon as practicable was thought sufficient because the appellant would be interested in a speedy resolution and retaining the fourteen day time frame might give rise to an inference that there is no need for a court to act until the expiration of the fourteen days.

2. The terms district clerk and appellate clerk were changed to district court and court of appeals.

3. In the second sentence of subdivision (a) "the" appellant was changed to "an" appellant.

4. The opening language of the second sentence was changed. Rule 3 says that the only thing a party must do to obtain review is file a notice of appeal; therefore, it would be inappropriate to begin the sentence by stating that "to obtain review" a party must file other papers in addition to the notice of appeal. The sentence was changed to state that "[a] party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, shall file . . ."

5. The second sentence was divided into two separate sentences. The first one ending with the words "statement of reasons." The resulting third sentence was altered to read: "An appellant who questions the factual basis for the district court's order shall file a transcript . . ."

6. The sentence beginning with "[i]t must be heard" (the old fourth and now fifth sentence) was divided into two sentences, the first of which ends with the word "require." The resulting sixth sentence was then altered so that it states "[b]riefs need not be filed unless the court so orders."

7. The heading of subdivision (b) was changed from "appeal from" to "review of" an order regarding release. The change reflects the fact that review may be obtained either by appeal or, in appropriate cases, by motion.

8. The first sentence of subdivision (b) was altered by inserting the words "from that order" after the words "notice of appeal" in the first clause. The change was necessary to make it clear that if a party files a notice of appeal only from the conviction, the party must file a motion to obtain review of the bail determination.

9. In the second sentence of subdivision (b), the words "appeal or" were deleted as unnecessary.

The amended draft read as follows:

Rule 9. Release in a Criminal Case.

(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -- The district court shall state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, shall file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order shall file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) Review of an Order Regarding Release After Judgment of Conviction.-- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal of the judgment of conviction or the terms of the sentence. Both the order and the review are subject to the terms of Rule 9(a). In addition, the papers filed by the applicant for review must include a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence.

(c) Criteria for Release.-- The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. sec. 3142 and sec. 3143.

The Committee also agreed that the Committee Note should explain that even after judgment of conviction the initial application for release must be filed with the district court. The statement that all the requirements of (a) apply to (b) means, among other things, that before review may be sought in the court of appeals, the district court must, after entry of the judgment of conviction, enter an order regarding release.

The amended draft was unanimously approved for submission to the Standing Committee.

Item 91-12

At the time of the review of local rules by the Local Rules Project, five circuits had rules allowing attorneys, as well as judges, to preside at prehearing conferences. The Project suggested that the Advisory Committee consider amending Rule 33 to permit attorneys to preside at prehearing conferences. The Advisory Committee decided to review Rule 33 in its entirety and Judge Ripple appointed a subcommittee consisting of Judges Hall and Logan and the Solicitor General's office to assist the Reporter in developing drafts. Two drafts were prepared prior to the meeting and on Tuesday evening the subcommittee met and prepared a consolidated draft for the full Committee's consideration. The consolidated draft presented to the Committee read as follows:

Rule 33. Appellate Conference

The court may direct the attorneys, and in appropriate cases the parties, to participate in a conference to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or an attorney designated by the court for that purpose. Before a conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case and resolve procedural matters. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement. Except to the extent disclosed in the conference order, statements made in discussions held pursuant to this rule are confidential.

Judge Logan introduced the draft. He noted that the current rule states that a conference is conducted by a court or judge and most circuits now want the flexibility to use non-judges as presiders. Judge Logan also pointed out that the current rule is the appellate equivalent of a pre-trial hearing and does not anticipate that settlement of the case might be the subject of a conference.

Judge Logan explained some of the specific differences between the draft and existing Rule 33.

1. The caption is "Prehearing Conference" rather than "Appellate Conference" in recognition of the fact that occasionally a conference is held after oral argument.
2. The draft allows the court to require that "parties" attend the conference. Sometimes it is educational for the client to attend the conference and the client's presence may aid in settlement of the case.
3. The draft allows the court to require the parties to attend the conference only "in appropriate cases." There are a variety of situations when it is not appropriate to require the party to attend, most notably one cannot require the entire government to attend a conference.
4. The draft uses the singular form, "a" conference, but the subcommittee intended to have the Committee Note explain that a conference may be ongoing and may be reconvened a number of times.

5. The draft includes the "possibility of settlement" among possible conference topics.
6. The draft recognizes that conferences are often held by telephone.
7. The draft allows an attorney designated by the court to preside over a conference.
8. The draft requires an attorney to consult with his or her client before the conference and obtain as much authority as feasible to settle the case and resolve procedural matters.
9. The draft states that statements made in conference are confidential.

Judge Logan noted that conferences may have two different objectives: the first, to simplify the issues, or to direct attention of the parties to the issues the court wants discussed, or to settle procedural matters; the second, to settle the case. Judge Ripple asked whether the rule should have separate provisions for the two different types. Judge Logan observed that although a conference is often begun as a scheduling conference or one dealing with simplification of the issues, it often progresses to settlement discussions. Therefore, too stark a separation between the two types may be a disadvantage.

With regard to confidentiality Judge Logan raised questions. He noted that statements made in a settlement conference should not be revealed to a judge who will hear the case. However, there may be need to discuss with a party or with co-counsel information that is revealed during the conference. The language that statements made during a conference "are confidential" may be too broad.

Mr. Kopp stated that the government has two significant concerns which he thought could be adequately dealt with in a note. The first concern arises from the court's authority to require "parties" to attend a conference. He stated his opinion that the limitation to "appropriate cases" is important. For instance, Mr. Kopp stated that he did not think that it would be appropriate to require the Secretary of HHS to appear at a settlement conference. Judge Williams asked what such a principle would mean in the corporate context. A corporation cannot appear except through agents; but would it be appropriate to require attendance of a corporate officer? The Committee concluded that the term "parties" is sufficiently broad to allow a court to determine that an executive of General Motors or some other employee with authority, including the general counsel, constitutes "the party."

Mr. Kopp also focused upon the language requiring a lawyer to consult with his or her client before a conference and obtain as much authority "as feasible." Again, he expressed the opinion that the "as feasible" language is important to the government. He also noted that there are others, such as foreign governments, who might have difficulty obtaining authority to settle.

Mr. Kopp stated that if both those issues are adequately clarified by the Committee Note, the Department of Justice would be satisfied with the rule.

Judge Williams expressed his opinion that the government may not deserve individual mention because there are many entities that have similar problems. Judge Hall agreed that the government, as a party, should not be given different treatment. Mr. Kopp pointed out that the language of the rule is open ended enough to allow the court to determine the proper course of action.

A number of changes were made in the draft.

1. The caption was changed to "Appeal Conferences." The caption "Appellate Conference" was reminiscent of "judicial conference."

2. The language of the first sentence was changed from the singular -- "a conference" -- to "one or more conferences" (the language used in the criminal rules).

3. The second sentence was amended to state that a conference may be conducted by "a judge or other person" designated by the court for that purpose. The "other person" language encompasses a broad range of possibilities including a senior district judge, a former state court judge, magistrate, or attorney.

4. The third sentence was amended to state that "[b]efore a settlement conference" an attorney must consult with his or her client and obtain as much authority as feasible to settle the case. The language requiring the lawyer to consult with the client about procedural matters was dropped because a court may issue an order governing the procedure in a case (with or without the consent of the parties) and even when a procedural matter is the subject of negotiation, it is not usually a matter about which a lawyer must consult his or her client.

5. The confidentiality provision was limited to statements made in settlement discussions so that orders and agreements as to procedural matters need not be held confidential.

The confidentiality provision was further amended. The purpose of stating flatly that statements made during settlement discussions are confidential was intended to make it clear that such statements may not be communicated to anyone -- not to the court and not to third parties such as the press. Obviously disclosure to the client or co-counsel may be necessary. Moreover, the bar needs to have confidence that the information will be held confidential within the court. The sentence was amended to read: "Except to the extent disclosed in the conference order, statements made in settlement discussions held pursuant to this rule are confidential and may not be disclosed to any judge of the court, any other court personnel, or any other person who is not a party or a representative of a party."

The amended draft was unanimously approved. The amended draft read as follows:

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an other controlling the course of the proceedings or implementing any settlement agreement. Except to the extent disclosed in the conference order, statements made in settlement discussions held pursuant to this rule are confidential and may not be disclosed to any judge of the court, any other court personnel, or any person who is not a party or a representative of a party.

Items 92-1 and 92-2

The Reporter told the Committee that at the last Standing Committee the Reporters from all of the Committees were asked to work together to draft rules governing technical amendments and uniform numbering of local rules.

It is contemplated that each set of rules will have a rule requiring local court rules to be numbered to correspond to the national rules. The Advisory Committee had considered and approved a draft rule last spring for presentation at the Standing Committee's summer meeting. Each of the other advisory committees had also approved drafts. Because the drafts differed, the Standing Committee asked the reporters to confer and attempt to find a common solution so that the language in each set of rules would be uniform. The Reporter made several small changes in the Committee's earlier proposal so that it would more closely resemble the other drafts. Those changes were explained and the draft approved by the Committee. The Committee understood that approval of the draft did not guarantee that the final product would be identical to the draft. The approved draft read as follows:

Rule 47. Rules ~~by~~ of a Courts of Appeals

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ that are consistent with, but not duplicative of, ~~these~~ rules adopted under 28 U.S.C. § 2072. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals shall send the Administrative Office

of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all matters not provided for by rule, a court of appeals may regulate its practice in any manner consistent with rules adopted under 28 U.S.C. § 2072 and under this rule.

Similarly, it is contemplated that each of the sets of rules will contain a rule governing the procedures for making technical amendments of the rules. The rule would allow the Judicial Conference to make a technical amendment of a rule without the need for publication and review by the Supreme Court and Congress.

Last spring the Advisory Committee considered a draft prepared by the Style Committee and expressed some reluctance to endorse the draft because its breadth was broader than the Advisory Committee felt prudent given the delicate relationship between the Congress and the judicial rulemaking process.

The Committee again considered the Style Committee's draft and a narrower draft prepared by the Reporter.

Judge Keeton noted that the Reporter's draft was very narrow because it eliminated the possibility of making changes essential to conforming the rules with statutory amendments. Judge Ripple pointed out that the emphasis in the Reporter's draft was upon the error correcting function of technical amendments. Judge Ripple also noted that the language authorizing changes to conform to statutory amendments creates a broad range of possible changes. Some changes are very narrow and technical, such as changing "magistrate" to "magistrate judge," yet other changes involve substantial rewriting of a rule, such as changing Rule 9 to conform to changes made by the Bail Reform Act. Judge Keeton responded that the amendments to Rule 9 (concerning the government's ability to appeal a bail decision) which the Advisory Committee had just approved should not be considered technical.

Judge Ripple then stated that one of his concerns had been whether a broad technical amendment rule could be used to achieve numerical or substantive integration of the rules, a proposal that has been discussed several times in the Standing Committee. Judge Keeton assured the Committee that such changes would require the use of the full procedures, including publication and Supreme Court and Congressional review.

The Committee discussion then focused upon the Style Committee's draft and made changes to it. One of the matters specifically discussed was whether it is appropriate to treat changes in style as technical amendments. The Committee agreed that it would be better to omit any language authorizing style changes. The amended draft read as follows:

Rule 50. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, or typography, to make nonsubstantive changes essential to conforming these rules with statutory

amendments, or to make other similar technical changes.

The draft was approved by a vote of six to one. With regard to "nonsubstantive changes" essential to conforming with statutory amendments, the Committee agreed that the change from "magistrate" to "magistrate judge" might be used as an example of a nonsubstantive change in the rules.

Judge Ripple then turned the Committee's attention to the "Discussion Items" on the agenda. Because of time constraints, Judge Ripple took the items out of order.

Item 91-16

At the Committee's December 1992 meeting a subcommittee consisting of Judges Boggs, Hall and Jolly was created to consider the desirability of developing national procedures for handling death penalty cases.

Judge Jolly conducted an informal survey of the judges in his circuit. The judges stated that the problems the courts experience in handling death penalty cases do not originate from the federal rules and that the federal rules cannot solve the problems. The primary procedural problems are delays and last minute appeals and these emanate from the state courts and the district courts. Judge Jolly concluded that it is unlikely that a federal appellate rule could substantially improve the situation. A substantial portion of the local rules governing death cases really deal with internal operating procedures such a panel selection and whether the panel stays with a case throughout its life. The only topic as to which a national rule might be useful is stays and the Supreme Court has pretty much set the guidelines. Judge Jolly also expressed the opinion that even if there were a need for a federal appellate rule governing death penalty cases, the topic is so controversial that this Committee would be inextricably involved in conflict and would be unable to handle the rest of its work.

The subcommittee consensus was that the Advisory Committee should take no further action. The Advisory Committee concurred.

Item 91-6

Fed. R. App. P. 39(c) allows a prevailing party to recover the cost of "producing necessary copies of briefs." The cost of producing the "original" is not recoverable but the cost of producing the copies is recoverable. The Seventh Circuit opinion in Martin v. United States, 931 F.2d 453 (7th Cir. 1991) suggests that Rule 39 might be amended "to provide for some arbitrary allocation of the costs of word processing equipment between producing the originals and producing the copies."

The Committee expressed some interest in pursuing that suggestion. Judge Hall asked

who would determine how much amortization is appropriate. Judge Williams stated that it should be possible to fashion an easily administered bright line rule. Judge Ripple asked Mr. Strubbe to consult with the other clerks and the Administrative Office about the feasibility of such a rule.

Item 86-23

The proposal was prompted by the difficulty a prisoner may have in filing timely objections to a magistrate judge's report because a prisoner's receipt of mail is often delayed. Judge Ripple noted that the problem is the converse of the one addressed by the Committee in response to Houston v. Lack. Houston v. Lack addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this proposal is that an incarcerated person also does not have control over when mail is delivered -- a problem with incoming mail.

Judge Ripple also asked Mr. Strubbe to consult with his colleagues about this issue.

Discussion of items 91-17 (uniform plan for publication of opinions) and 91-28 (updating Rule 27 on motions practice) was held over until the next meeting.

Item 92-3

At the April 1992 meeting Judge Logan noted that there is a conflict between Rule 4(b) and 18 U.S.C. § 3731. Judge Ripple stated that the question for the Committee is whether to ask the Standing Committee, and thereafter the Judicial Conference, to ask Congress to amend the statute to conform with the rule. The Committee received a letter from the Solicitor General asking the Committee to put the question on hold.

Judge Logan had raised this issue at the last meeting because he had the question before him. The Solicitor said that the question should arise only rarely and Judge Logan agreed. Judge Logan also agreed with the Solicitor that it might be a good idea to add a comment to the Committee Note accompanying the rule pointing out that the issue has been litigated and referring the reader to the Sasser opinion. The Committee responded that a Committee Note cannot be amended without publication, etc. The conclusion was that the item should remain on the agenda for further discussion at a later meeting.

As the time for the meeting closed, Mr. Froeb asked that the record reflect his appreciation and commendation to Judge Ripple, Professor Mooney, and their staffs for an excellent meeting. The Committee concurred.

As the meeting concluded Judge Ripple made a number of announcements.

1. Judge Ripple indicated that he would circulate a memorandum about the Eleventh Circuit's response to the Local Rules Project indicating that the issue is "dead listed" unless some member of the Committee has objection.

2. The Advisory Committee's general assessment of the local rules project is still on-going.

3. Judge Ripple announced that the Standing Committee at its summer meeting referred back to the Advisory Committee for further consideration its proposal (items 89-5 and 90-1) to include in the appellate rules a warning that a request for a rehearing in banc does not toll the time for filing a petition for certiorari.

4. With regard to item 91-3, Judge Ripple announced that in addition to giving the Rules Committees authority to define a final decision by rule, Congress recently added authority to expand by rule the instances in which interlocutory appeal is permitted. Judge Ripple will write to the circuits seeking their counsel.

5. With regard to item 92-4, the Solicitor General's proposal to amend Rule 35 to include intercircuit conflict as a ground for seeking rehearing in banc, Judge Ripple stated that the Federal Judicial Center is proceeding with their study which will include questions pertinent to this item and he expressed his hope that at the spring meeting the Committee will have the benefit of that information.

The meeting adjourned at 2:00 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter